UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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DORA OLAYA, *et al.*, Plaintiffs,	)	2:11-cv-997-KJD-CWH
vs.	)	ORDER
WAL-MART STORES, INC., *et al.*, Defendants.	)	

This matter is before the Court on the Defendant Wal-Mart Stores, Inc.'s ("Wal-Mart") Emergency Motion to Exclude All Evidence Regarding Plaintiffs' Claims for Business and Wage Loss, Medical Expenses, and Damages (#12), filed January 18, 2012. The Court also considered Plaintiffs' Response (#13), filed February 3, 2012 and Defendant's Reply (#14), filed February 13, 2012. The Court held a hearing on this matter on March 5, 2012.

BACKGROUND

On July 20, 2011, the parties submitted a proposed discovery plan (#8) wherein they agreed to conduct discovery on all claims and defenses allowed pursuant to the Federal Rules of Civil Procedure. The proposal indicated that the parties made their pre-discovery disclosures on or before July 12, 2011 and included a discovery cut-off date of March 13, 2012. The proposed discovery plan and scheduling order was granted on July 21, 2011 (#9). Notably, the parties requested and the Court approved a 270-day discovery period because the parties anticipated extensive expert discovery as well as review of voluminous medical records and depositions of medical providers. The Court granted a limited extension until April 30, 2012 to conduct certain discovery after the discovery cut-off date including: several depositions, a vocational rehabilitation assessment, and a site inspection (#19).

Plaintiffs' initial disclosures, served on July 12, 2011, contained a "Computation of

Damages" list totaling $395,211.45. It indicated that the "Medical Bills not yet received," "Lost Wages," "Future Damages," and "Residual Damages" categories were "To Be Supplemented" and provided no documentation of the evidentiary basis for the total amount. Five months later, in December 2011, the first and second supplement were served, but they did not expand on the damages categories. On January 5, 2012, the third supplement was served, which added $932,089 into the "Lost Wages" category and increased Plaintiffs' total claim to over $1.3 million. This disclosure was made 176 days after the Federal Rule of Civil Procedure 26(a) deadline. On January 13, 2012, the fourth supplement was served, which added $280,500 into the "Future Damages" category and increased Plaintiffs' total claim to over $1.6 million. This disclosure was made on the expert disclosure deadline and about six months after the initial disclosure deadline.

Pursuant to Federal Rule of Civil Procedure 37(c)(1), Defendant Wal-Mart requests an order precluding Plaintiffs from using the information disclosed due to the untimely disclosure under Rule 26(a). Plaintiffs contend they should not be precluded from presenting the evidence identified in the supplemental disclosures because Wal-Mart has been aware of the requested damage categories since the initial disclosures and they regularly and timely supplemented the information as it became available. Further, Plaintiffs contend that any failure to disclose information under Rule 26(a) was harmless.

DISCUSSION

1. Rule 26(a)

Unless otherwise exempted, "a party must, without awaiting a discovery request" provide the opposing party with initial disclosures pursuant to Rule 26(a). Fed. R. Civ. P. 26(a)(1)(A). As part of its initial disclosures, a party must provide:

> a computation of each category of damages claimed by the disclosing party-who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

Fed. R. Civ. P. 26(a)(1)(A)(iii). Unless a different time is set by stipulation or court order, initial disclosures must be made within 14 days of the parties' Rule 26(f) conference. Fed.

R. Civ. P. 26(a)(1)(C). A party is not excused from making its initial disclosures because it has not fully investigated the case. Fed. R. Civ. P. 26(a)(1)(E). Additionally, the "category of damages" disclosure requires more than a list of the broad types of damages. *See CCR/AG Showcase Phase I Owner, L.L.C. v. United Artists Theatre Circuit, Inc.*, 2010 WL 1947016 (D. Nev. 2010) (finding order excluding evidence of lost profit damages justified) (citing Design *Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2nd Cir. 2006) (finding failure to include lost profits in list of claimed damages justified exclusion sanction)).

Discovery in this matter opened on June 27, 2011. Plaintiffs were required to provide a computation of each category of damages and the underlying documents or other evidentiary materials pursuant to Rule 26(a) on or before July 11, 2011. On July 12, 2011, one day later, Plaintiffs provided initial disclosures, which contained a "Computation of Damages" list totaling $395,211.45. The disclosures stated that this amount included all lost wages, future and/or residual damages, and medical bills not yet received, but noted that all four categories of damages were "To Be Supplemented." Plaintiffs contend that they were not required to disclose more detailed damages claims until after receiving expert input. However, future expert analysis does not relieve the Plaintiffs of the obligation to provide information reasonably available. *See Frontline Medical Assocs., Inc. v. Coventry Health Care*, 263 F.R.D. 567, 569 (C.D. Cal. 2009) (ordering supplemental disclosures to contain a computation of each category of damages for each cause of action). Consequently, the Court finds Plaintiffs did not comply with their obligation under Rule 26(a).

2. Rule 26(e)

Pursuant to Rule 26(e)(1)(A):

> A party who has made a disclosure under Rule 26(a) . . . must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure is incomplete or incorrect or if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Rule 26(e) creates a duty to supplement, not a right. *See Luke v. Family Care and Urgent Medical Clinics*, 323 Fed. Appx. 496, 500 (9th Cir. 2009) (holding district court did not abuse its discretion in excluding untimely expert declarations). Rule 26(e) does not create a "loophole"

for a party who wishes to revise its initial disclosures to its advantage after the deadline has passed. *Id.* Indeed, supplementation means "correcting inaccuracies . . . based on information that was not available at the time of the initial disclosure." *Id.* (citing *Keener v. United States*, 181 F.R.D. 639, 640 (D. Mont. 1998) (finding second disclosure so substantially different from first that it could not qualify as a correction of an incomplete or inaccurate expert report)).

Plaintiffs served their first supplement on December 12, 2011, which is five months after their Rule 26(a) initial disclosures. The second supplement was served eight days later, on December 20, 2011. Neither the first nor second supplement contained sufficient information regarding Plaintiffs' business loss, wage loss, or future damages claims. On January 5, 2012, Plaintiffs disclosed their wage loss claims in the third supplement, which is about six months after the initial disclosures deadline. On January 13, 2012, Plaintiffs disclosed their future damages claims in the fourth supplement, which is the same day as the expert disclosure deadline. The Court notes that the supplemental disclosures were made prior to the extended discovery cut-off deadline of April 30, 2012. Nevertheless, the Court is unconvinced that the damages information in these supplements was newly discovered or otherwise not reasonably available to Plaintiffs at the initial disclosures deadline. Consequently, the Court finds the third and fourth supplemental disclosures containing additional damages information untimely under Rule 26(e).

3. Rule 37(c)

If a party fails to provide information as required by Rule 26(a) or 26(e), then "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or harmless." Fed. R. Civ. P. 37(c)(1). Rule 37(c) "gives teeth" to the requirements of Rule 26(a) and Rule 26(e) so courts are given a particularly wide latitude to issue sanctions under Rule 37(c)(1). *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (holding district court did not abuse its discretion in excluding testimony of defendant's only damages expert as a sanction). Generally, the exclusion penalty is "self-executing" and "automatic." *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir. 2008) (noting Rule 37(c)(1)'s exclusion sanction provides a

strong inducement for disclosure of material and affirming district court's preclusion of undisclosed damages evidence). The party facing sanction has the burden of showing that any failure to disclose is substantially justified or harmless. *See Yeti*, 259 F.3d at 1107. The factors that may properly guide a court in determining whether a violation is substantially justified or harmless are: (1) prejudice or surprise to the party against who the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence. *Manneh v. Inverness Medical Innovations, Inc.*, 2010 WL 3212129 at *2 (S.D. Cal. 2010) (finding failure to disclose certain documents and witness not harmless where opposing party was unable to prepare its defense in time for trial).

Plaintiffs provided the third and fourth supplements in violation of Rule 26(a) and 26(e), which triggers sanctions under Rule 37(c) unless they show their failure is substantially justified or harmless. Plaintiffs argue any failure is substantially justified or harmless because: (1) they provided authorizations for Wal-Mart to subpoena third-party records from which Wal-Mart could calculate the damages; (2) they reserved the right to supplement their damages disclosures; (3) they disclosed their damages claims by the deadline for disclosing expert witnesses; and (4) they made timely and regular supplemental disclosures. In contrast, Wal-Mart contends that Plaintiffs' disclosure of the damages just prior to the expert disclosure deadline deprived Wal-Mart of sufficient time to evaluate its need for, obtain, and prepare expert witnesses.

The Court does not find any of Plaintiffs' proffered reasons for its discovery shortcomings compelling. The amount and nature of damages claimed is a significant part of a personal injury case and one that Wal-Mart was not required to acquire on its own. Plaintiff's attempt to shift its affirmative duty onto Wal-Mart cannot be allowed. *See Baltodano,* et. al. *v. Wal-Mart Stores, Inc.*, Case No. 2:10-cv-2062 (D. Nev., Aug. 31, 2011), (Dkt. #26) (ordering exclusion of all evidence regarding future medical expenses because disclosure was not made in time for defendant to obtain expert witnesses).[1] Additionally, despite numerous requests from

[1] The Court notes that Plaintiffs' counsel, Mr. Ohlson, is aware of the Court's ruling in *Baltodano*, as he is employed by the same firm that was sanctioned for the same issue - untimely

Defense counsel, Plaintiffs did not disclose evidence and information regarding business loss, wage loss, and future damages until eight days prior to the expert disclosure deadline. Plaintiffs' third and fourth supplemental disclosures made on January 5, 2012 and January 13, 2012 included information for more than seventy-five percent of Plaintiffs' claimed damages. Further, these disclosures attributed approximately $1.2 million to lost wages and future damages. As a result, Wal-Mart has been unable to obtain and prepare expert witnesses or other evidence to support its defense. This surprise is prejudicial. Additionally, Wal-Mart would need an extension of discovery from the Court to prepare and retain expert witnesses in order to cure the prejudice. Such an extension would disrupt the schedule of the Court and result in wasted time, energy, and work. *See Yeritas Operating Corp. v. Microsoft Corp.*, 2008 WL 657936 (W.D. Wash. 2008) (holding failure to provide damages information or identify expert was not harmless because discovery would need to be reopened). Moreover, the Court finds that the failure to disclose such information in the initial disclosures was willful given the timing and numerous communications from Defense counsel regarding its necessity. Consequently, Plaintiffs have not carried their burden to prove that their disclosure was substantially justified or harmless.

The Court considers five factors in deciding whether a sanction is proper: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *See Wendt v. Host Intern., Inc.*, 125 F.3d 806 (9th Cir. 1997) (finding exclusion of expert testimony no longer warranted). In this case, discovery would need to be reopened to provide the parties with the opportunity to obtain expert witnesses. Reopening discovery to allow for the exploration of new evidence does not serve to expedite the resolution of this litigation. Additionally, as discussed above, Wal-Mart has been prejudiced by the Plaintiffs' delay in providing computation of damages information. On the other hand, excluding the damages information does violence to the disposition of this case on its

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disclosure of damages - he took over this case for the same attorney who was sanctioned, and Defense counsel provided Mr. Ohlson with copies of the *Baltadano* exclusion Order. Case No. 2:10-cv-2062, (#26).

merits and less drastic sanctions are available. The Court must decide whether the public policy favoring disposition of cases on their merits and the availability of less drastic sanctions outweighs the delay and prejudice that results if Plaintiffs are not precluded from introducing damages evidence.

Based on the circumstances, an order barring Plaintiffs from introducing the damages evidence at issue is justified.[2] The fact that this sanction can be imposed does not necessarily mean that it should. *See, e.g., Valley Engineers Inc. v. Electric Engineering Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998) (noting something other than case-dispositive sanctions will often suffice); *Frontline Med. Assocs.*, 263 F.R.D. at 570 (holding exclusion was not proper where plaintiff knew of defendant's experts even before filing the complaint). However, the harm cannot be easily remedied and most factors support the sanction of exclusion. Discovery closed on April 30, 2012. In order to remedy the harm to Wal-Mart, discovery would have to be reopened for a substantial amount of time to allow for the retention and preparation of economic and medical experts. Both sides would also need time to retain and prepare rebuttal expert reports. This would prevent an expeditious resolution of the litigation and clutter the Court's docket. Although an extension would lower the risk of prejudice to Wal-Mart, it has already been harmed by the delay. Further harm would incur because it would need to conduct additional litigation made necessary by the willful conduct of Plaintiffs' counsel.

Furthermore, a sanction of exclusion here will not be a case dispositive sanction. Plaintiffs will still be able to pursue the damages indicated in the initial disclosures, which allows the case to be decided on the merits. A computation of damages disclosure should have sufficient detail to enable a defendant to understand its potential exposure and make informed settlement and discovery decisions. *See City and County of San Francisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 221 (N.D. Cal. 2003) (holding plaintiffs required to supplement initial

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[2] The Court notes that Plaintiffs' counsel had prior warning regarding violating the discovery rules governing computation of damages disclosures as they were sanctioned on this matter in *Baltadano*. Case No. 2:10-cv-2062, (#26). In fact, the circumstances of this matter are so similar to *Baltadano*, involve the same counsel, and constitute an even more egregious violation of Rules 26(a) and 26(e), that the Court is lead to the conclusion that a pattern of discovery abuse has emerged. Consequently, no lesser sanction would suffice to deter this type of behavior.

damages disclosure by specifying damages allegedly sustained for each contract at issue). Plaintiffs' computation of damages failed to include sufficient detail and despite Defense counsel's repeated attempts to obtain further information, Plaintiffs did not supplement their damages claims until the eve of the expert disclosure deadline. Consequently, the failure to timely disclose the contours of Plaintiffs' business loss, wage loss, medical expenses, and damages was neither substantially justified nor harmless. Accordingly,

IT IS HEREBY ORDERED that Defendant Wal-Mart Stores' Emergency Motion to Exclude All Evidence Regarding Plaintiffs' Claims for Business Loss, Past and/or Future Wage Loss, Loss of Earning Capacity, Future Medical Expenses, and Future and/or Residual Damages (#12) is **granted.**

Furthermore, Defendant seeks reasonable costs, including attorneys' fees required to bring this motion. Therefore,

IT IS HEREBY ORDERED that on or before August 15, 2012, Defendant shall file an affidavit of attorneys' fees and costs incurred in bringing this motion.

IT IS FURTHER ORDERED that on or before August 22, 2012, Plaintiff shall file a response to said affidavit.

DATED this 7th day of August, 2012.

C.W. Hoffman, Jr.
United States Magistrate Judge